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WHAT LAW GOVERNS THE VALIDITY OF A CONTRACT.

II. THE PRESENT CONDITION OF THE AUTHORITIES.

England.

IN England, as has been said, the law intended by the parties is the law which governs the validity of a contract. This doctrine is stated in an ingenious and original form by Professor Dicey. "The essential validity of a contract is (subject to the exceptions hereinafter mentioned) governed indirectly by the proper law of the contract. . . . Proper law of the contract means the law, or laws, by which the parties to a contract intended or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended or may fairly be presumed to have intended to submit themselves." [1] This rule thus formulated by Professor Dicey expresses excellently well the purport of the English decisions.

In applying this doctrine certain presumptions are allowed, or at least certain circumstances are given weight. Thus the law of the place of making is *prima facie* the law intended; [2] or the law of the flag; [3] or the law indicated by the form of the document; [4] or the law

[1] Conf. Laws, 2 ed., pp. 545, 529.

[2] Jacobs *v.* Credit Lyonnais, 12 Q. B. D. 589.

[3] Lloyd *v.* Guibert, 6 B. & S. 100, L. R. 1 Q. B. 115.

[4] Chartered Mercantile Bank *v.* Netherlands I. S. N. Co., 10 Q. B. D. 521; *In re* Missouri S. S. Co., 42 Ch. D. 321; Hamlyn *v.* Talisker Distillery, [1894] A. C. 202; Royal Exch. Assur. Corp. *v.* Sjorforsakrings Vega, [1901] 2 K. B. 567; [1902] 2 K. B. 384; Spurrier *v.* La Cloche, [1902] A. C. 446.

of the place of performance.[1] And when a foreign government is party to a contract, the law of such government is applied.[2]

A new point was raised by the case of Bank of Africa *v.* Cohen.[3] In this case a married woman in England had given a power of attorney to transfer her land in the Transvaal to the plaintiff bank, as security for advances thereafter made to her husband. By the English law she was capable of contracting or transferring land. By the law of the Transvaal she could transfer or contract to transfer the land *as surety for her husband* only if she had some pecuniary interest in the transaction or expressly waived the benefit of the law which protected her; which was not the case here. The registrar having refused to transfer the land in the Transvaal, this suit was brought in England, asking, first, for a decree of specific performance "of the agreement contained in the deed — for the transfer to the plaintiffs of the said property"; second, for an injunction against proceedings in the Transvaal to recover documents of title and against transferring title; third, for damages.

The Divisional Court and the Court of Appeal dismissed the bill, on the ground that the question was one of capacity to enter into a contract; and that (according to the opinion of Mr. Dicey)[4] the capacity of parties to a contract to convey land must be determined by the *lex rei sitae.*

This case might be dismissed as a decision solely on a question of capacity, were it not that the question was not in fact as to the woman's capacity, but whether certain formalities required by the *lex situs* had been fulfilled. By the law of the Transvaal a married woman may convey land; the capacity is not lacking. If the land is conveyed as security for a debt of her husband, certain formalities must be accomplished; but this is not a question of capacity, but of form of contracting.[5] As this point was distinctly made and was the basis of the decision in the important matrimonial cases of Sottomayor *v.* De

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[1] South African Breweries *v.* King, [1899] 2 Ch. 173, [1900] 1 Ch. 273; Moulis *v.* Owen, [1907] 1 K. B. 746. It is a rather striking fact that in all the cases cited in this and the preceding notes except in note (3) the court, by devious ways, found that the parties intended the law of England to govern.

[2] Smith *v.* Weguelin, L. R. 8 Eq. 198.

[3] [1909] 2 Ch. 129 (C. A.).

[4] Conf. Laws, 2 ed., p. 501.

[5] Gorrell Barnes, Pres. in Ogden *v.* Ogden, [1908] P. 46, 52.

Barros [1] and Ogden *v.* Ogden,[2] it is probable that it will at least be argued when the question arises that Bank of Africa *v.* Cohen is authority for the general proposition that the validity of a contract for the conveyance of land is to be determined by the *lex rei sitae.*

In answer to this it may well be urged that the question decided was really not raised by the case, for several reasons.

In the first place, the so-called "agreement" was merely a power of attorney, in the ordinary form, to transfer the land. It contained no agreement whatever to convey the land to the bank, still less to refrain from conveying it to another. Even assuming that the court, interpreting the document, could find by implication a contract to convey, the plaintiff could not, in accordance with the English authorities, obtain a decree. First, no decree for a conveyance of foreign land will be made by an English court where, as here, the conveyance cannot be made by merely giving a deed, but must be accomplished by an act done in the foreign country.[3] Second, no decree for the specific performance of a negative agreement will be granted by an English court where it would not accomplish the general object of the contract unless by indirection it compelled the performance of a positive term of the contract, and especially not where the negative agreement is not in express terms, but only by implication.[4] Third, no suit is permitted in an English court where (as here, on the prayer for injunction against claiming the title deeds) the title to foreign land is involved,[5] or where (as here, on the prayer for damages) the suit concerns foreign land.[6]

It thus appears that the question of the validity of the contract was not involved in this case; and it is therefore not certain that the case establishes any general principles as to the validity of contracts for the sale of foreign land; and the English law must be regarded as still unsettled.[7]

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[1] 3 P. D. 1, distinguishing on that ground Simonin *v.* Mallac, 2 Sw. & Tr. 67.

[2] [1908] P. 46, distinguishing on that ground Sottomayor *v.* De Barros, and following Simonin *v.* Mallac.

[3] Waterhouse *v.* Stansfield, 10 Hare 254.

[4] Whitwood Chemical Co. *v.* Hardman, [1891] 2 Ch. 416.

[5] British S. A. Co. *v.* Comp. de Moçambique, [1893] A. C. 602.

[6] Sydney Municipal Council *v.* Bull, [1909] 1 K. B. 7, 12.

[7] See Dicey, Conf. Laws, 2 ed., p. 810. The Massachusetts court in a case cited by counsel, has decided that a contract for the sale of land, as distinguished from a conveyance, is governed by the law of the place of making. Polson *v.* Stewart, 167 Mass. 211.

English Colonies.

The law of the English colonies follows that laid down by the English courts; and therefore where the contract itself contains a clause providing that the law of a certain country shall govern the contract, that law is applied.[1]

Federal Courts.

The condition of the authorities in the Federal courts is confused and puzzling. No doctrine can be said to have been adopted by the Supreme Court to the exclusion of other inconsistent doctrines. An examination of important typical decisions on the point under consideration will sufficiently indicate the condition of the problem.

1. In Wayman *v.* Southard,[2] Chief Justice Marshall adopted the principle that the intention of the parties determined the law applicable to a contract: "A contract is governed by the law with a view to which it was made."

2. In the next important decision[3] the court adopted the form (which has become the classic form in this country) that "the law of the place where the contract is made, and not where the action is brought, is to govern in expounding and enforcing the contract, unless the parties have a view to its being executed elsewhere; in which case it is to be governed according to the law of the place where it is to be executed." Robinson *v.* Bland and two early New York cases were cited as authorities. This rule is in effect, of course, the rule that the place of performance strictly governs the validity of a contract.

3. A few years later was decided the case of Andrews *v.* Pond,[4] an action upon a bill of exchange to which the defense was usury. The bill was drawn in New York on Alabama, and violated the laws of both states; but the two laws differed as to the effect of the illegality. The court first asserted that contracts made in one place to be executed in another are to be governed by the law of the place of performance. But this, the learned Chief Justice said, is because the parties are permitted by the place of contract to make a contract in accordance

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[1] Bunnell *v.* Shilling, 28 Ont. 336; Johnson *v.* Mutual L. I. Co., 5 New So. W. 16.
[2] 10 Wheat. 1 (1825).
[3] Cox *v.* U. S., 6 Pet. 172 (1832).
[4] 13 Pet. 65 (1839).

with the law of the place of performance; and if the parties do not choose to abide by the latter law, the law of the place of making controls their acts. By this ingenious but complex theory the law of the place of contracting governs; but that law is that contracts may be made either in accordance with the local provisions, or if the parties so choose in accordance with the laws of the state of performance. This theory gives the parties an option, but only as between the laws of two places.

4. In Scudder *v.* Union Bank [1] the question was as to the validity of an oral acceptance in one state of a bill of exchange payable in another. The court held that this question was to be determined by the law of the place of contracting, and stated the general principle thus:

"Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit was brought. A careful examination of the well-considered decisions of this country and of England will sustain these positions."

5. In Pritchard *v.* Norton [2] the question was as to the validity of a bond executed in New York, and performable in Louisiana. The consideration was invalid by the law of New York. The reasoning of the court, in holding the bond valid, was that a contract is governed by the law with a view to which it was made; that it is made with a view to performance, and therefore with a view to the law of the place of performance; and that the latter law therefore governs its validity. It was mentioned in this case as an additional reason for holding the contract to be governed by the law of Louisiana, that the law of that place would make it valid, and the parties must have made it with a view to the law which would make it valid.

6. In Liverpool and Great Western Steam Co. *v.* Phenix Insurance Co.,[3] a case identical in its facts with the English case *In re* Missouri Steamship Co., already cited, the court held that a contract is governed by the law of the place of making unless the parties clearly

[1] 91 U. S. 406 (1875).
[2] 106 U. S. 124 (1882).
[3] 129 U. S. 397 (1889).

manifest at the time of entering into the contract a mutual intention that it shall be governed by the law of some other country.

7. In Equitable Life Insurance Co. *v.* Clements [1] and in Fowler *v.* Equitable Trust Co.[2] the court held that a contract is necessarily subject to the statutory provisions of the place of contracting.

8. In Hall *v.* Cordell,[3] a case identical in its facts with Scudder *v.* Union Bank, already examined, the court held that the law of the place of payment governed the validity of an oral acceptance. "Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That law, consequently, must determine the rights of the parties."

9. In London Assurance *v.* Companhia de Moagens [4] the court said that "generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation."

10. In Mutual Life Insurance Co. *v.* Cohen [5] the court asserted that "the presumption is in favor of the law of the place of contract. He who asserts the contrary has the burden of proof."

11. In two late insurance cases [6] it has been intimated that an express incorporation into the contract of a provision that the laws of a certain state should govern the validity of the contract would be effective; but this has not been expressly decided.

It will thus be seen that almost every rule ever suggested for determining the law applicable to the validity of a contract which has ever been seriously urged in a common-law court has at one time or another been adopted by the Supreme Court of the United States as the basis of its decision; that each decision has been made apparently without realizing its inconsistency with former decisions; [7] and that

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[1] 140 U. S. 222 (1891).
[2] 141 U. S. 384 (1891).
[3] 142 U. S. 116 (1891).
[4] 167 U. S. 149 (1897).
[5] 179 U. S. 262 (1900).
[6] Mutual L. I. Co. *v.* Cohen, 179 U. S. 262 (1900); Mutual L. I. Co. *v.* Hill, 193 U. S. 551 (1904).
[7] Mr. Justice Gray, in Liverpool S. Co. *v.* Phenix Ins. Co., *supra*, does indeed speak of "the great preponderance, if not the uniform concurrence, of authority"; but this appears to be an almost unique realization of the condition of the authorities. In Hall *v.* Cordell, *supra*, Mr. Justice Harlan cites Scudder *v.* Union Bank as an authority on the local law of Illinois, but not on the principle of conflict of laws involved, though the decision in Hall *v.* Cordell on that point was exactly opposed to that in Scudder *v.* Union Bank.

many of the decisions are self-contradictory. As is natural where the judges come from different states where different views are held, the opinion is apt to express the doctrine accepted in the state from which the judge came. Thus, Mr. Justice Gray, in Liverpool Steam Co. *v.* Phenix Insurance Co., expresses in substance the rule accepted in Massachusetts; while Mr. Justice Peckham, in London Assurance *v.* Companhia de Moagens, expresses the view firmly established in New York. It is natural that the inferior federal courts should reflect the same confusion of opinion. It would be almost impossible to make a complete citation of the decisions and *dicta* of these courts on the general question; those cases which have been found have been collected and classified in an appendix.

Alabama.

The doctrine of the Alabama court is expressed in the following quotation from Story:

"A contract, as to its nature, obligation, and validity, is to be governed by the law of the state where made, unless it is to be performed in another state. When the contract is expressly or tacitly to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties — that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance." [1]

In other words, Alabama has squarely accepted the law of the place of performance as the law governing the validity of a contract.[2] Where a contract is to be performed in the place where it was made, or where no place of performance is expressly named, it is commonly said that the law of the place of making governs;[3] thus in this case also following Story's language. But this form of rule

[1] Accepted from Story in Hanwick *v.* Andrews, 9 Port. 9, 26; reaffirmed in the latest case, Southern Exp. Co. *v.* Gibbs, 46 So. 465 (1908).

[2] Hawley *v.* Bibb, 69 Ala. 52; Western U. T. Co. *v.* Way, 83 Ala. 542, 4 So. 844; Peet *v.* Hatcher, 112 Ala. 514.

[3] Goodman *v.* Munks, 8 Port. 84 (*semble*); Dunn *v.* Adams, 1 Ala. 527 (*semble*); Givens *v.* Western Bank, 2 Ala. 397; Miller *v.* McIntyre, 9 Ala. 638; Peake *v.* Yeldell, 17 Ala. 636 (*semble*); Jones *v.* Jones, 18 Ala. 248 (*semble*); McDougald *v.* Rutherford, 30 Ala. 253; Walker *v.* Forbes, 31 Ala. 9; Evans *v.* Kittrell, 33 Ala. 449; Henderson *v.* Adams, 35 Ala. 723; Broughton *v.* Bradley, 36 Ala. 689; Ensley Lumber Co. *v.* Lewis, 121 Ala. 94; Kraus *v.* Gorry, 146 Ala. 548.

is confined to cases where the contract is not expressly performable elsewhere.[1]

In Southern Railway *v.* Harrison,[2] the court intimated that if the parties had in view some other law the court would apply it. This intimation seems not to have been adopted in general; but in usury cases it is not without support. These cases must be regarded here, as in many jurisdictions, as a class by themselves.

In usury cases the general rule seems to be that either the law of the place of making or that of the place of performance may be selected to make the contract valid,[3] so long at least as the place of making was not chosen *mala fide*, with the mere purpose of evading the usury law of the place of performance.[4] The question remains whether the parties can stipulate for any other law than that of the place of making or of performance; for instance the law of the situs of mortgaged land. The question was left open in the first case where it was raised.[5] In Falls *v.* United S. L. & B. Co.,[6] where the loan was made and payable in Alabama, but expressly provided that it should be governed by the law of Minnesota where the loan company was domiciled, it was held that the law of Alabama governed and the contract was void because the company was forbidden to do business in Alabama. But in Ashurst *v.* Ashurst,[7] where the loan was made and payable in New York, secured by mortgage of land in Alabama where the debtor lived, and the contract contained an express agreement that it should be governed by the law of Alabama, it was held that that law applied. In United States S. & L. Co. *v.* Beckley,[8] the contract being both made and to be performed in Minnesota and the law of Minnesota being stipulated for in the con-

[1] Cowles *v.* Townsend, 37 Ala. 77; Cubbedge *v.* Napier, 62 Ala. 518; McGarry *v.* Nicklin, 110 Ala. 559. See however one case where the court in a contract of shipment appears to have followed the law of the place of shipment and not that of the place of delivery. Mobile & G. R. R. *v.* Copeland, 63 Ala. 219. In the same sort of case the court subsequently followed the law of the place of performance. Southern Exp. Co. *v.* Gibbs, 46 So. 465.

[2] 119 Ala. 539.

[3] Farrior *v.* New England U. S. Co., 88 Ala. 277; American F. L. M. Co. *v.* Sewell, 92 Ala. 163.

[4] Hayes *v.* B. & L. Assoc., 124 Ala. 663; Pioneer S. & L. Co. *v.* Nonnemacher, 127 Ala. 521, 545; Farmers' S. & B. & L. Assoc. *v.* Kent, 131 Ala. 246.

[5] American F. L. M. Co. *v.* Sewell, 92 Ala. 163.

[6] 97 Ala. 417.

[7] 119 Ala. 219.

[8] 137 Ala. 119.

tract, that also was allowed to govern as to usury. The same decision was made in Allen *v.* Riddle,[1] where the loan was expressly payable in the foreign state, though made in Alabama.

It must be said, then, that in all contracts where the question is not one of usury the law of the place of performance governs; in usury cases that law which would avoid the taint of usury, even perhaps a law chosen by the parties which is neither the law of the place of making nor of the place of performance.

Arkansas.

It was said in the earliest cases, and continues to be said,[2] that the law of the place of making governs the validity of a contract; and this is the language of the latest case.[3] In most if not all the cases this is a mere *dictum*, as the contract was, so far as appears, both made and payable in the same state.[4] In one usury case [5] it was intimated that by the ordinary rule the parties were to be regarded as contracting with reference to the law of the place of performance, but where that would make the agreement void they would be regarded as adopting the law of the place of making. In a case,[6] however, where a contract was made in Arkansas or Missouri, and performable partly in Arkansas and partly in the Indian Territory, the court said that the law of its place of performance governed each portion of the contract; quoting Wharton's Conflict of Laws as follows: "The place where an obligation originates is often accidental; is remote, sometimes receding from spot to spot, as we search for it; and is extrinsic to the essence of the engagement, and to its subsequent development and efficiency. It is different, however, with the place of

[1] 141 Ala. 621.

[2] Lane *v.* Levillian, 4 Ark. 76; Howcott *v.* Kilbourn, 44 Ark. 213; State M. F. I. Assoc. *v.* Brinkley S. & H. Co., 61 Ark. 1; Kelley *v.* Telle, 66 Ark. 464.

[3] Franklin L. I. Co. *v.* Morrell, 84 Ark. 511. "The contract was executed in the state of Illinois, where the insurance society was domiciled, and where this member then resided. It was therefore an Illinois contract, and must be construed according to the laws of that state."

[4] Bowles *v.* Eddy, 33 Ark. 645; Parsons Oil Co. *v.* Boyett, 44 Ark. 230; Matthews *v.* Paine, 47 Ark. 54; Bank of Harrison *v.* Gibson, 60 Ark. 269; Sawyer *v.* Dickson, 66 Ark. 77; Farmers' S. & B. & L. Assoc. *v.* Ferguson, 69 Ark. 352; Crebbin *v.* Deloney, 70 Ark. 493; Franklin L. I. Co. *v.* Galligan, 71 Ark. 295; Mutual R. F. L. Assoc. *v.* Minehart, 72 Ark. 630; Hough *v.* Maupin, 73 Ark. 518.

[5] Whitlock *v.* Cohn, 72 Ark. 83. And see Bank of Harrison *v.* Gibson, 60 Ark. 269.

[6] Midland Valley Ry. *v.* Moran N. & B. M. Co., 80 Ark. 399.

performance, which enters into the vitals of the obligation, so far as concerns its fulfilment." [1]

This was said, however, of the validity of a railroad lien, which is clearly governed by the law of the situs.

In Mutual R. F. L. Assoc. *v.* Minehart,[2] a policy made and performable in Arkansas contained a provision that it should be governed by the laws of New York. The court held that this did not constitute the laws of New York the laws by which the validity of the contract was to be determined; but simply made them a part of the contract, to be construed like any other provision of it. In other words, the obligation, if any, must be created by the laws of Arkansas; if it was created, then the New York provisions took place as a term of the agreement.

California.

The question seems seldom to have arisen. In a case where a contract of carriage was made in Missouri for delivery in California the court said that the law of the place where the contract is made governs, unless the parties at the time of making it had some other law in view.[3] But in a later case, [4] an action on an insurance policy, the court took a different view, saying that "as the contract provides for performance in San Francisco, the California law must govern." The law of California is therefore left doubtful on the authorities.

Colorado.

In most of the cases [5] the place of making and performance were the same, and the court held that that law governed, on the ground that the validity of a contract is determined by the law of the place of making. And the doctrine was repeated in a suit against the endorser of commercial paper, where the place of endorsement and of payment were different.[6] The law of Colorado therefore seems settled in favor of the law of the place of contracting.

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[1] 2 Conf. Laws, 2 ed., §§ 398, 399.

[2] 72 Ark. 630.

[3] Palmer *v.* Atchison T. & S. F. R. R., 101 Cal. 187.

[4] Progresso S. S. Co. *v.* St. Paul F. & M. I. Co., 146 Cal. 279.

[5] Wolf *v.* Burke, 18 Col. 264; Des Moines L. Assoc. *v.* Owen, 10 Col. App. 131.

[6] Sullivan *v.* German Nat. Bank, 18 Col. 99.

Connecticut.

In the earliest cases it was said that the law of the place where the contract is entered into governs the validity of the contract;[1] though in these cases no different place of performance was in question. And this view has been accepted in a few classes of cases later. Thus in cases of carriage it had been held that the law of the place of making governs;[2] and in cases of sale in one state for delivery in another, the law of the former state has been held to apply to the sale.[3] It was however intimated in an early case that if "it is perceived from their tenor that they were entered into with a view to the laws of some other state" contracts are governed by such other law.[4] Later, still a third view was adopted by the court, to wit, that the law of the place of performance must necessarily govern a contract.[5] Finally the rule appears to have been adopted that the intention of the parties governs, but that they are presumed to intend the law of the place of performance. The doctrine is thus enunciated by the court:

"When the contract is to be performed elsewhere, or is to have its entire beneficial operation and effect elsewhere, then the law of the latter place is to govern; because in the absence of anything to the contrary, it is presumed that the parties so intended."[6]

District of Columbia.

In two cases of commercial paper, where the obligation was both made and payable in one state, it was held to be governed as to its

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[1] Bowne *v.* Olcott, 2 Root 353; Vermont S. Bank *v.* Porter, 5 Day 316; Brackett *v.* Norton, 4 Conn. 517; Roe *v.* Jerome, 18 Conn. 138; Downer *v.* Chesebrough, 36 Conn. 39.

[2] Camp *v.* Hartford & N. Y. S. B. Co., 43 Conn. 333.

[3] Johnson C. S. Bank *v.* Walker, 80 Conn. 509; Moline J. Co. *v.* Dinnan, 81 Conn. 111, 70 A. 634.

[4] Smith *v.* Mead, 3 Conn. 253; Hale *v.* New Jersey S. N. Co., 15 Conn. 539; Greathead *v.* Walton, 40 Conn. 226.

[5] Richardson *v.* Rowland, 40 Conn. 565. In the case of Webster *v.* Howe M. Co., 54 Conn. 394, the place of making and of performance was the same; and the law of that place was adopted.

[6] Chillingworth *v.* Eastern T. W. Co., 66 Conn. 306; Beggs *v.* Bartels, 73 Conn. 132.

nature and validity by the law of that state.[1] In the latest case[2] the court adopted the intention of the parties as the governing circumstance, and followed Liverpool & Great Western Steam Co. *v.* Phenix Insurance Co. in holding that the law of the place of making prevails unless the parties clearly appear to have some other law in view.

Florida.

In the only case the court held that the law of the place of making governed;[3] but no place of performance was named, and the alternative urged was the law of the domicil of the contracting company.

Georgia.

In Georgia the earliest case[4] held that the validity of a contract must be determined by the law of the place of making; the court saying: "If a contract be void in its origin, it is inconceivable how validity can be given to it in any other country. It is no contract from the beginning." In the next case, however, the court intimated *obiter* that there was an exception to this general rule where the contract was payable elsewhere by its terms.[5] This *dictum* was accepted, and it became the settled rule in Georgia that the validity of a contract is determined by the law of the place of performance.[6] It has been held, however, that a contract absolutely void at the place of making cannot be validated by the law of the place of performance.[7] Of course where a contract is both made and payable in a state, the law of that state governs;[8] and it has been held that where a contract is performable in part in the state of making, and in part elsewhere, the law of the place of making governs.[9] The contrary has however

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[1] Gallaudet *v.* Sykes, 1 McArth. 489; Lockwood *v.* Lindsey, 6 App. D. C. 396.

[2] Croissant *v.* Empire S. R. Co., 29 App. D. C. 538 (1907).

[3] Pace *v.* Pace, 19 Fla. 438.

[4] Cox *v.* Adams, 2 Ga. 158.

[5] Levy *v.* Cohen, 4 Ga. 1.

[6] Vanzandt *v.* Arnold, 31 Ga. 210; Dunn *v.* Welsh, 62 Ga. 241.

[7] Hager *v.* Nat. G. A. Bank, 105 Ga. 116, following an intimation in Martin *v.* Johnson, 84 Ga. 481.

[8] Hill *v.* Wilker, 41 Ga. 449; Champion *v.* Wilson, 64 Ga. 184; Bailey *v.* Devine, 123 Ga. 653, 51 S. E. 603.

[9] Martin *v.* Johnson, 84 Ga. 481.

been held in carrier cases where a shipment was made in another state for carriage to Georgia and delivery there; the court has applied the law of Georgia not only in matters connected with the delivery but even in determining the validity of a limitation of liability.[1]

While the law of the place of performance appears to be accepted in general as the law applicable to the contract the court has in some cases applied the law intended by the parties. Thus in contracts of insurance, where the law of the state of domicil of the insurance company was expressly adopted in the policy and the place of the contract agreed to be there, this provision has been enforced when it did not conflict with the policy of the forum, which was the place of making the contract.[2]

As in many states, the usury cases must be treated by themselves as exceptional. In general, the parties are permitted to choose their law. Of course, where the loan is made and payable in the borrower's state, the law of that state applies.[3] And where a note made in Georgia was made payable in Massachusetts merely to avoid the Georgia usury laws it was held that the Georgia law should be applied.[4] But where the parties select *bona fide* a law which really bears a relation to their agreement, the court will give effect to their choice. So where the parties expressly agreed upon the law of the place of making that was enforced.[5] And where a loan payable in New York was made in Georgia and was secured on Georgia land, the court, upon the intent that Georgia law should apply being found, held the loan valid according to that law.[6] In that case the question of intent appears to have been left to the jury. The parties are not restricted to the laws of the places of making and performance. Thus where the loan was both made and payable in New York, but the borrower was in Georgia, and it was secured by a mortgage of real estate there, the court said the parties evidently intended a Georgia contract, and it was held valid according to that law.[7] But in a precisely similar case the court held that there was no proof of an intention to

[1] Southern Exp. Co. *v.* Shea, 38 Ga. 519; Carter *v.* Southern Ry., 3 Ga. App. 34; Atlanta & W. P. R. *v.* Broome, 3 Ga. App. 641.

[2] Massachusetts B. L. Assoc. *v.* Robinson, 104 Ga. 256; Missouri S. L. I. Co. *v.* Lovelace, 1 Ga. App. 446.

[3] Hollis *v.* Covenant B. & L. Assoc., 104 Ga. 318.

[4] Kilcrease *v.* Johnson, 85 Ga. 600.

[5] New England M. S. Co. *v.* McLaughlin, 87 Ga. 1.

[6] Underwood *v.* American M. Co., 97 Ga. 238.

[7] Jackson *v.* American M. Co., 88 Ga. 756.

be governed by any other law, and it was therefore governed by the law of New York.[1]

Illinois.

In most of the cases in this state the law of the place of making has been applied as the proper law to determine the validity of a contract;[2] though in most of the cases in which this rule was laid down there was in fact no other place of performance.[3] But this was never the undisputed doctrine of the Illinois courts. In a very early case the court spoke incidentally but confidently of "the rule that the law of the place of payment is to govern;[4] and this supposed rule has in fact been applied by the court in a few cases.[5] While this rule has little support on the authorities, the rule that the parties may choose their law was stated early,[6] and has often been applied since.[7] In the case of Adams *v.* Robinson [8] the doctrine was most ingeniously stated by the court in a way to reconcile it with the principle most generally accepted:

"The laws of the country where a contract is made are obligatory upon the parties, and upon principle no contract declared void by those laws ought to be enforced in any other country. . . . The laws of every country allow parties to enter into obligations with reference to the laws of the country where such obligations are to be performed; although such obligations may not be in accordance with the laws of the country where they

[1] Odom *v.* New England M. S. Co., 91 Ga. 505.

[2] Bradshaw *v.* Newman, 1 Ill. 133 [94]; Stacy *v.* Baker, 2 Ill. 417; Schuttler *v.* Piatt, 12 Ill. 417; Crouch *v.* Hall, 15 Ill. 263; Phinney *v.* Baldwin, 16 Ill. 108; Smith *v.* Whitaker, 23 Ill. 367; Anstedt *v.* Sutter, 30 Ill. 164; Barber *v.* Bell, 77 Ill. 490; Miller *v.* Wilson, 146 Ill. 523; McCoy *v.* Griswold, 114 Ill. App. 556.

[3] Sherman *v.* Gassett, 9 Ill. 521; Pomeroy *v.* Manhattan L. Ins. Co., 40 Ill. 398; Roundtree *v.* Baker, 52 Ill. 241; Milwaukee & S. P. Ry. *v.* Smith, 74 Ill. 197; Evans *v.* Anderson, 78 Ill. 558; Burchard *v.* Dunbar, 82 Ill. 450; Gay *v.* Rainey, 89 Ill. 221; Pope *v.* Hanke, 155 Ill. 617; Schlee *v.* Guckenheimer, 179 Ill. 593; Coverdale *v.* Royal Arcanum, 193 Ill. 91.

[4] Holbrook *v.* Vibbard, 3 Ill. 465.

[5] Lewis *v.* Headley, 36 Ill. 433; Wooley *v.* Lyon, 117 Ill. 244 (seemingly overruling Holbrook *v.* Vibbard, 3 Ill. 465 and Belford *v.* Bangs, 15 Ill. App. 76 on the facts); Price *v.* Burns, 101 Ill. App. 418 (seemingly opposed on principle to Anstedt *v.* Sutter, 30 Ill. 164); North P. & P. Co. *v.* Western U. T. Co., 70 Ill. App. 275 (seemingly opposed on principle to Pennsylvania Co. *v.* Fairchild, 69 Ill. 260, and other cases cited in note 1, p. 93).

[6] Strawbridge *v.* Robinson, 10 Ill. 470.

[7] McAllister *v.* Smith, 17 Ill. 328; Pennsylvania Co. *v.* Fairchild, 69 Ill. 260.

[8] 37 Ill. 45.

are made as regards obligations to be performed in that country they may be strictly in accordance with such laws as to obligations to be performed in other countries. The right to enter into contracts with reference to the laws of another country is one allowed by nations for the convenience of those transacting business within their respective territorial limits, to enable them to obtain such rights as they could have secured in the country where the contract is to be performed by a just observance of its laws. No nation can be justly required to allow persons subject to its laws to enter into contracts without reference to and not in accordance either with its own laws or with the laws of the country where the contract is to be performed."

This doctrine that the parties may choose between the law of the place of contracting and that of the place of performance has been applied in the case of the carriage of goods from one state to another, the court holding that since the contract was made and was partly performed in one state, the parties must be taken to have contracted with reference to the law of that state.[1]

Indiana.

The doctrine commonly laid down in this state is that the law of the place of making a contract governs. This was first applied in cases where the place of making and of performance were the same;[2] but it has been adhered to in general for cases of all kinds,[3] even where the place of making and the place of performance differed.[4] In usury cases, however, the court has allowed the parties to contract with reference either to the law of the place of making or of that of performance.[5]

One class of cases was treated exceptionally. In cases of commer-

[1] Pennsylvania Co. *v.* Fairchild, 69 Ill. 260; Michigan C. R. R. *v.* Boyd, 91 Ill. 268; Illinois C. R. R. *v.* Beebe, 174 Ill. 13; Western T. Co. *v.* Hosking, 19 Ill. App. 607; Wald *v.* Pittsburg C. C. & S. L. R. R., 60 Ill. App. 460. But *contra* in the case of a telegram. North P. & P. Co. *v.* Western U. T. Co., 70 Ill. App. 275.

[2] Titus *v.* Scantling, 4 Blackf. 89; Yeatman *v.* Cullen, 5 Blackf. 240; Smith *v.* Blatchford, 2 Ind. 184; Hall *v.* Harris, 16 Ind. 180; Pratt *v.* Wallbridge, 16 Ind. 147; Mindenhall *v.* Gately, 18 Ind. 149.

[3] Alford *v.* Baker, 53 Ind. 279; Sondheim *v.* Gilbert, 117 Ind. 71.

[4] Union C. L. I. Co. *v.* Thomas, 46 Ind. 44; Bethell *v.* Bethell, 54 Ind. 428; Keiwert *v.* Meyer, 62 Ind. 587; Fisher *v.* Parry, 68 Ind. 465; Equitable L. A. Soc. *v.* Perkins, 41 Ind. App. 183, 80 N. E. 682.

[5] Smith *v.* Muncie Bank, 29 Ind. 158; Pancoast *v.* Travellers' Ins. Co., 79 Ind. 172; Thompson *v.* Edwards, 85 Ind. 414.

cial paper made in one state and payable in another the court repeatedly said that the law of the place of payment governed the nature and validity of the obligation.[1] But in the latest case [2] these cases are all explained away or distinguished and the law of the place of making is applied to the obligation. The case leaves it a little uncertain whether this law is applied on the ground that it is absolutely required by the rule, or whether it is applied as the law presumably intended by the parties.

Iowa.

The law of the place of making was laid down in the earliest cases as the law governing the validity of a contract;[3] and it seems still to be adhered to in determining the validity of contracts for the sale of chattels.[4] But it was soon held that in usury cases at least the parties might choose that law which would make the contract valid;[5] and in favor of validity of a debt secured by mortgage even the law of the domicil of the debtor, where the mortgaged land was situated, has been applied though the contract of loan was made and performable elsewhere.[6] And the expressed intention of the parties has also been rendered effective in insurance cases.[7]

But the later cases seem to have adopted the law of the place of performance as the law governing validity;[8] probably still with the limitation, early suggested,[9] that a contract forbidden by statute at

[1] Hunt *v.* Standart, 15 Ind. 33 (see Mix *v.* State Bank, 13 Ind. 521); Rose *v.* Thames Bank, 15 Ind. 292; Rose *v.* Park Bank, 20 Ind. 94; Browning *v.* Merritt, 61 Ind. 425; Lindeman *v.* Rosenfield, 67 Ind. 246; Fordyce *v.* Nelson, 91 Ind. 447; Midland Steel Co. *v.* Citizens' Nat. Bank, 34 Ind. App. 107, 72 N. E. 290.

[2] Garrigue *v.* Keller, 164 Ind. 676.

[3] Bernard *v.* Barry, 1 G. Greene, 388; Bean *v.* Briggs, 4 Ia. 464; Davis *v.* Bronson, 6 Ia. 410; Thorp *v.* Craig, 10 Ia. 461; Huse *v.* Hamblin, 29 Ia. 101.

[4] Engs *v.* Priest, 65 Ia. 232; Bowlin Liquor Co. *v.* Brandenburg, 130 Ia. 220.

[5] Butters *v.* Old, 11 Ia. 1; Bigelow *v.* Burnham, 83 Ia. 120.

[6] Arnold *v.* Potter, 22 Ia. 194.

[7] Johnson *v.* New York L. I. Co., 109 Ia. 708 (parties agreed on law of place of making); Goodwin *v.* Provident S. L. A. Assoc., 97 Ia. 226 (parties agreed on law of place of performance).

[8] Born *v.* Home Ins. Co., 120 Ia. 299 (*semble*); Spinney *v.* Chapman, 121 Ia. 38; Banco de Sonora *v.* Bankers' M. C. Co., 100 N. W. 532 (which however was really a question concerning the method of performing the contract). In an earlier case where this rule was applied the question was as to the rate of interest. Seymour *v.* Butler, 8 Ia. 304.

[9] McDaniel *v.* Chicago & N. W. Ry., 24 Ia. 412.

the place of making cannot be made good by any other law. And it appears to be settled that in case of a contract of carriage performable partly within and partly outside the state of shipment the validity of the obligation is "necessarily" determined by the law of the place of shipment.[1]

Kansas.

The court first laid down the rule that the law of the place of making governed the validity of a contract,[2] soon, however, limiting it by adding, "unless it appears that they are to be performed in or according to the laws of another state."[3] And in case of a shipment of goods from one state to another, the court held that the parties must be assumed to have contracted with reference to the law of the place of shipment.[4]

In ordinary cases the rule finally adopted seems to be, that the law of the place of performance should govern validity.[5] But in the case of usury the court has taken a different view. The intention of the parties is given controlling weight, if it is formed *bona fide*, and not with the purpose of evading the law,[6] especially if that intention is expressed as a term of the contract.[7]

Kentucky.

Where a contract is made and is expressly to be performed in one state, its validity is of course governed by the law of that state;[8] and

[1] McDaniel *v.* Chicago & N. W. Ry., 24 Ia. 412; Talbott *v.* Transp. Co., 41 Ia. 247; Hazel *v.* Chicago M. & S. P. R. R., 82 Ia. 477; Hudson *v.* Northern P. R. R., 92 Ia. 231. See, however, as to the "necessity," Banco de Sonora *v.* Bankers' M. C. Co., 100 N. W. 532, where it was suggested that the law of each portion of the performance should govern it.

[2] Feineman *v.* Sachs, 33 Kan. 621.

[3] Briggs *v.* Latham, 36 Kan. 255.

[4] Pacific Exp. Co. *v.* Foley, 46 Kan. 457.

[5] Alexandria A. & F. S. R. R. *v.* Johnson, 61 Kan. 417 (where the place of making and of performance appear to have been the same); Alexander *v.* Braker, 64 Kan. 396; Sykes *v.* Citizens Nat. Bank, 98 Pac. 206.

[6] Royal Loan Assoc. *v.* Foster, 68 Kan. 468. Great stress is laid in this case and in People's B. L. & S. Assoc. *v.* Kidder, 9 Kan. App. 385, on the fact that the land lay in Kansas, and the enforcement of the mortgage must therefore be there; but a careful examination shows that the court was speaking only of the right to enforce the contract in Kansas, and that it contemplated the possibility of its nevertheless being valid by another law.

[7] Midland S. & L. Co. *v.* Solomon, 71 Kan. 185; Steinman *v.* Midland S. & L. Co., 79 Pac. 1077.

[8] Johnson *v.* U. S. Bank, 2 B. Mon. 310; Hyatt *v.* Bank of Kentucky, 8 Bush,

the same is true where, no place of performance being named, the contract is presumed to be performable at the place of making.[1] And where a contract is performable in part at the place of making and in part in another state, its validity is governed by the law of the place of making.[2]

The generally accepted doctrine, however, though it is actually the ground of decision in only a few cases, is that the law of the place of performance named in the contract, if any place is so named, governs.[3] This rule is, however, subject to this limitation; that if the contract is void for illegality at the place of making, the law of the place of performance cannot give it validity.[4]

Louisiana.

In most of the cases there was no place of performance named, or the contract was performable in the place of making. In all such cases the rule stated is, that the law of the place of making governs.[5]

193; Young *v.* Bullen, 19 Ky. L. Rep. 1561, 43 S. W. 687; Arnett *v.* Pinson, 108 S. W. 852.

[1] Steele *v.* Curle, 4 Dana, 381; Thomas *v.* Beckman, 1 B. Mon. 29; Cross *v.* Petree, 10 B. Mon. 413; Young *v.* Harris, 14 B. Mon. 556; Piner *v.* Clary, 17 B. Mon. 661; Jameson *v.* Gregory, 4 Met. 363; Archer *v.* Nat. Ins. Co., 2 Bush, 226; Carlisle *v.* Chambers, 4 Bush, 268; Ford *v.* Buckeye Ins. Co., 6 Bush, 133; Stevens *v.* Gregg, 89 Ky. 461; Gibson *v.* Sublett, 4 Ky. L. Rep. 730; Fally *v.* Steinfield, 10 Ky. L. Rep. 982. The liability of the endorser of commercial paper is to pay at the place of endorsement, not at the place of payment of the principal obligation; and the validity and nature of an endorsement is therefore governed by the law of the place of endorsement, though the paper is payable elsewhere. Short *v.* Trabue, 4 Met. 299.

[2] Cleveland C. C. & S. L. R. R. *v.* Druien, 26 Ky. L. Rep. 103, 80 S. W. 778 (contract of carriage). But *contra* of the undertaking of a telegraph company: Western U. T. Co. *v.* Eubanks, 100 Ky. 591.

[3] Goddin *v.* Shipley, 7 B. Mon. 575; Tyler *v.* Trabue, 8 B. Mon. 306; Western U. T. Co. *v.* Eukanks, 100 Ky. 591. In a late insurance case, however, the court seems to have accepted the doctrine that the intent of the parties would govern, stating the presumption that they intended the law of the place of making. Washington L. I. Co. *v.* Glover, 78 S. W. 146, 25 Ky. L. Rep. 1327. See, however, U. S. S. & L. Co. *v.* Scott, 98 Ky. 695, where the expressed intention of the parties was not given effect.

[4] Ohio & M. Ry. *v.* Tabor, 98 Ky. 503; Western U. T. Co. *v.* Eubanks, 100 Ky. 591.

[5] No place of performance named: Vidal *v.* Thompson, 11 Mart. 23; Evans *v.* Gray, 12 Mart. 475; Baldwin *v.* Gray, 4 Mart. N. S. 192; Ory *v.* Winter, 4 Mart, N. S. 277; Ferguson *v.* Flower, 4 Mart. N. S. 312; Saul *v.* His Creditors, 5 Mart. N. S. 569; Astor *v.* Price, 7 Mart. N. S. 408; King *v.* Harman, 6 La. 607; Gates *v.* Renfroe, 7 La. Ann. 569; Newton *v.* Gray, 10 La. Ann. 67; Grove *v.* Nutt, 13 La. Ann. 117; Serra *v.* Hoffman, 30 La. Ann. 67; Grevenig *v.* Washington L. I. Co., 112 La. 879.

And in a well-considered early decision the court held that the law of the place of making and not of performance governed the nature and validity of the contract.[1] But in several cases where the court held that the law of the place of contracting governed, they added the limitation, unless it was performable elsewhere or made with reference to some other law.[2] And in the case of a contract for a lease of land, the law of the place of making was not applied, but the law of the situs, where the contract was to be performed.[3]

Maine.

After laying down the general rule that a contract is governed by the law of the place of making, in several cases where in fact no place of performance was named,[4] and in one case where the rule seems to have been necessary to the result,[5] the court in later cases has suggested other rules, though in every case that has yet been decided the court has in fact applied the law of the place of making. Thus in Bell *v.* Packard,[6] the court, in applying the law of the place of making, admitted the truth of counsel's argument that a contract might be made with reference to the law of the place of performance. In Carey *v.* Mackey [7] the court was willing to admit that "the general rule is, that contracts are to be interpreted" according to the law of the place of performance, but "there are some exceptions when the question pertains to the validity of the contract rather than to the meaning of its provisions," and the rule itself was more applicable to commercial than to other contracts. And in Emerson Co. *v.* Proctor [8] the court, after laying down and following the "general rule gov-

Place of making and of performance the same: Clague *v.* Creditors, 2 La. 114; Barrett *v.* Walker, 14 La. 303; Long *v.* Templeman, 24 La. Ann. 564; Lachman *v.* Block, 47 La. Ann. 505.

[1] Depau *v.* Humphrey, 8 Mart. N. S. 1. And see Lynch *v.* Postlethwaite, 7 Mart. 69.

[2] Shiff *v.* Louisiana S. I. Co., 6 Mart. N. S. 629; Malpica *v.* McKown, 1 La. 248; Arayo *v.* Currell, 1 La. 528; Trabue *v.* Short, 18 La. Ann. 257.

[3] Stanton *v.* Harvey, 44 La. Ann. 511. The fact that the contract was one concerning land was mentioned, but seems not to have been the ground of decision.

[4] Maguire *v.* Pingree, 30 Me. 508; Stickney *v.* Jordan, 58 Me. 106; Lindsay *v.* Hill, 66 Me. 212; Wright *v.* Andrews, 70 Me. 86. This general rule was repeated later without limitation or exception in Roads *v.* Webb, 91 Me. 406.

[5] Bailey *v.* Hope Ins. Co., 56 Me. 474; insurance effected in Maine on New Hampshire property by a Rhode Island company: validity governed by the law of Maine.

[6] 69 Me. 105.

[7] 82 Me. 516.

[8] 97 Me. 360.

erning the construction of a contract, that its validity is to be determined by the law of the place where it is made," felt it well to reënforce its decision by adding that the parties were "presumed to have contracted with reference to the laws of Maine," and that the inference to be drawn was "that the parties in fact regarded it as a Maine contract."

The court has never seriously considered the problem; the cases have in fact all been decided in accordance with the law of the place of making; the *dicta* approving other rules are confused and ill-considered. It would seem safest to place Maine among the states which accept the doctrine that the law of the place of contracting governs validity.

Maryland.

In several cases where the place of making and of performance was the same, the law of that place has been held to apply.[1] In the case of a contract of insurance made in Maryland, it is held that the parties cannot avoid the effect of a Maryland statute by a provision in the policy that it shall be governed by the law of the domicil of the company.[2]

Massachusetts.

It has been repeatedly and forcibly laid down as a general rule in this state that the law of the place of contracting determines the validity of a contract.[3] In a few cases the court has referred to

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[1] Stevens *v.* Rasin F. Co., 87 Md. 679; Latrobe *v.* Winans, 89 Md. 636; New York S. & T. Co. *v.* Davis, 96 Md. 81. In the early case of De Sobry *v.* De Laistre, 2 Harr. & J. 191, there is a *dictum* to the effect that in such a case the law of the place of performance governs.

[2] Robinson *v.* Hurst, 78 Md. 59; Mutual L. I. Co. *v.* Mullen, 107 Md. 457.

[3] The rule has been laid down without limitation in the following cases, where no place of performance separate from the place of making was expressed:

Williams *v.* Wade, 1 Met. 82; McIntyre *v.* Parks, 3 Met. 207; Warren *v.* Copelin, 4 Met. 594; Daniels *v.* Hudson R. F. I. Co. 12 Cush. 416; Heebner *v.* Eagle Ins. Co., 10 Gray, 131; Pine *v.* Smith, 11 Gray, 38; Lawrence *v.* Bassett, 5 All. 140; Stevenson *v.* Payne, 109 Mass. 378; Dolan *v.* Green, 110 Mass. 322; Thwing *v.* Great W. I. Co., 111 Mass. 93; Woodruff *v.* Hill, 116 Mass. 310; Morris *v.* Penn. M. L. I. Co., 120 Mass. 503; Murphy *v.* Collins, 121 Mass. 6; Stanton *v.* Demerritt, 122 Mass. 495; Shoe & L. N. Bank *v.* Wood, 142 Mass. 563; Harvey *v.* Merrill, 150 Mass. 1; Baxter Nat. Bank *v.* Talbot, 154 Mass. 213; Reliance M. I. Co. *v.* Sawyer, 160 Mass. 413; Emery *v.* Burbank, 163 Mass. 326; King B. M. Co *v.* Phoenix Ins. Co., 164 Mass. 291; Wylie *v.* Cotter, 170 Mass. 356; Commonwealth M. F. I. Co. *v.* William

the rule that the law of the place of performance governs, or that the law intended by the parties governs, with approval; but in no case has this been necessary to the decision.[1] And in several cases where the places of making and of performance were different the court has held the nature and validity of the obligation to be subject to the law of the place of making,[2] even though the parties especially provided for the adoption of another law.[3] In Akers *v.* Demond [4] the court, accepting the "general principle" that the law of the place of performance is the law of the contract, held that this is confined to the effect of the contract; the validity must be determined by the law of the place of making and "no other law can apply to it." When contracts are void by the law of that state they are void everywhere; they never acquire a legal existence.

The question was sharply presented by the case of Polson *v.* Stewart.[5] A contract for the sale of land in Massachusetts had been made in North Carolina between a wife and her husband; such an obligation could not be created in Massachusetts but it was valid in North Carolina. Massachusetts was the place of performance, and, as the situs of the land, the place which the parties contemplated as most concerned with the contract. The court nevertheless held that the contract was valid, and would be enforced in Massachusetts. Chief Justice Field dissented, on the ground taken by Dicey and the late

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Knabe & Co. Mfg. Co., 171 Mass. 265; Johnson *v.* Mutual L. I. Co., 180 Mass. 407; Daniell *v.* Boston & M. R. R., 184 Mass. 337; Nashua Sav. Bank *v.* Sayles, 184 Mass. 520; Callender M. & T. Co. *v.* Flint, 187 Mass. 104; Cherry *v.* Sprague, 187 Mass. 113; Jennings *v.* Moore, 189 Mass. 197; Bearse *v.* McLean, 199 Mass. 242.

So in cases of carriage where the place of contracting is also the place where performance begins.

Fonseca *v.* Cunard S. S. Co., 153 Mass. 553; O'Regan *v.* Cunard S. S. Co., 160 Mass. 356; Brockway *v.* American Exp. Co., 168 Mass. 257.

[1] Powers *v.* Lynch, 3 Mass. 77; Carnegie *v.* Morrison, 2 Met. 381; Brockway *v.* American Exp. Co., 171 Mass. 158; Mittenthal *v.* Mascagni, 183 Mass. 19. In Penobscot & K. R. R. *v.* Bartlett, 12 Gray, 244, the law of the place of performance was squarely adopted; but the question had to do with manner of payment, not with the validity of the obligation.

[2] Powers *v.* Lynch, 3 Mass. 77; Carnegie *v.* Morrison, 2 Met. 381; Holmes *v.* Manning, 19 N. E. 25; Millard *v.* Brayton, 171 Mass. 533.

[3] Dolan *v.* Mutual R. F. L. Assoc., 173 Mass. 197. The court evidently felt that such a term of the contract would be ineffective, even if there were no provision of the *lex loci* against it; but the express clause adopting another law not being on the face of the policy, as required by a statute of the place of making, it was held invalid.

[4] 103 Mass. 318.

[5] 167 Mass. 211.

English case examined above, that a contract concerning land is governed by the law of the situs.

It thus appears that Massachusetts is pretty firmly committed to the doctrine that the validity of a contract is necessarily governed by the law of the place of making.

Joseph H. Beale.

[*To be continued.*]

APPENDIX: FEDERAL CASES.

I. Place of Making.

In many cases the court without especially considering the matter, sometimes without reciting the place of performance at all, ruled that the law of the place of making governs the contract.

Slocum *v.* Pomeroy, 6 Cranch, 221; De Wolf *v.* Johnson, 10 Wheat. 367; Boyle *v.* Zacharie, 6 Pet. 635; Duncan *v.* U. S., 7 Pet. 435; Tilden *v.* Blair, 21 Wall. 241; Supreme Lodge *v.* Meyer, 198 U. S. 508; Shattuck *v.* Mutual L. I. Co., 4 Cliff. 598; Sortwell *v.* Hughes, 1 Curt. 244; White *v.* Conn. M. L. I. Co., 4 Dill. 177; McClintock *v.* Cummins, 3 McLean, 158; Dundas *v.* Bowler, 3 McLean, 397; Mott *v.* Wright, 4 Biss. 53; Lamb *v.* Lamb, 6 Biss. 420; Lamb *v.* Bowser, 7 Biss. 315, 372; Newcomb *v.* Mutual L. I. Co., Fed. Cas. No. 10,147; Mather *v.* American Exp. Co., 2 Fed. 49; Campbell *v.* Crampton, 2 Fed. 417; Northwestern M. L. I. Co. *v.* Elliott, 5 Fed. 225, 7 Sawy. 17; Schuenfeldt *v.* Junkerman, 20 Fed. 357; Swann *v.* Swann, 21 Fed. 299; Stubbs *v.* Colt, 30 Fed. 417; Ward *v.* Vosburgh, 31 Fed. 12; Wall *v.* Equitable L. A. Soc., 32 Fed. 273; Richter *v.* Frank, 41 Fed. 859; Garrettson *v.* North Atchison Bank, 47 Fed. 867; Knights T. & M. L. I. Co. *v.* Berry, 50 Fed. 511; Farmers' Nat. Bank *v.* Sutton Mfg. Co., 52 Fed. 191; Equitable L. A. Soc. *v.* Winning, 58 Fed. 541; Hicks *v.* National L. I. Co., 60 Fed. 690; Thomas *v.* Wabash S. L. & P. R. R., 63 Fed. 200; Anheuser-Busch B. Assoc. *v.* Bond, 66 Fed. 653; Central R. R. *v.* Kavanaugh, 92 Fed. 56; Bank of Topeka *v.* Eaton, 95 Fed. 355; Mutual L. I. Co. *v.* Hathaway, 106 Fed. 815; Fidelity M. L. Assoc. *v.* Jeffords, 107 Fed. 402; Albro *v.* Manhattan L. I. Co., 119 Fed. 629; Carrollton F. M. Co. *v.* American C. I. Co., 124 Fed. 25; Robinson *v.* Suburban B. Co., 127 Fed. 804.

Thus the law of the place of making is adopted as opposed to the law of the domicile of the parties,

Alexander *v.* Southern H. B. & L. Assoc., 120 Fed. 963; Schinotti *v.* Whitney, 130 Fed. 780; Northwestern S. S. Co. *v.* Mar. Ins. Co., 161 Fed. 166;

or the place from which the offer is sent,

Equitable L. A. Soc. *v.* Nixon, 81 Fed. 796; Equitable L. A. Soc. *v.* Trimble, 83 Fed. 85;

or the place where a document is signed, prior to its taking effect elsewhere as an obligation,

Buchanan *v.* Drovers' Nat. Bank, 55 Fed. 223; Aultman *v.* Holder, 68 Fed. 467; Phipps *v.* Harding, 70 Fed. 468.

The doctrine of Scudder *v.* Union Bank, that where a contract is made in one place to be performed in another the law of the place of making governs the nature and validity of the obligation, is accepted in several cases.

Scudder *v.* Union Bank, 91 U. S. 406; Equitable L. I. Co. *v.* Clements, 140 U. S. 226; Howenstein *v.* Barnes, 5 Dill. 482; Brown *v.* American F. Co., 31 Fed. 516; Exchange Bank *v.* Hubbard, 62 Fed. 112; Providence S. L. A. Soc. *v.* Hadley, 102 Fed. 856.

This has been held in two usury cases, though in that class of cases the decision is usually otherwise.

Davis *v.* Clemson, 6 McLean, 622; Kuhn *v.* Morrison, 75 Fed. 81.

In Blackwell *v.* Webster, 23 Blatch. 537, where the agreement was forbidden by law at the place of making, the court said that "there is no room to apply the fiction of law, that the place of performance of a contract is to be deemed the place of making it."

II. Place of Performance.

In a smaller number of cases it has been held that the law of the place of performance governs the validity of the contract.

Bell *v.* Bruen, 1 How. 169; London Assurance *v.* Companhia de Moagens, 167 U. S. 149; Kent *v.* Dawson Bank, 13 Blatch. 237; Oregon & W. T. & I. Co. *v.* Rathbun, 5 Sawy. 32; Payson *v.* Withers, 5 Biss. 269; Desmazes *v.* Mutual B. L. I. Co., Fed. Cas., No. 3821; Whitcomb *v.* Phoenix M. L. I. Co., Fed. Cas., No. 17,530; Neederer *v.* Barber, Fed. Cas., No. 10,079; Interstate B. & L. Assoc. *v.* Edgefield H. Co., 120 Fed. 422; Smith *v.* Mutual L. I. Co., 5 Fed. 582; Pacific S. S. L. & B. Co. *v.* Green, 123 Fed. 43; Berry *v.* Chase, 146 Fed. 625 (where it would seem that what was called the place of performance was really the place of making).

But where there is more than one place of performance, it has been held that the parties must *ex necessitate* be referred to the law of the place of making.

Morgan *v.* New Orleans M. & T. R. R., 2 Woods, 244.

III. Place making the Contract Valid.

In usury cases the court has often said that if the place of performance would hold an agreement void for usury, the law of the place of making may be resorted to for making the contract valid.

Andrews *v.* Pond, 13 Pet. 65; Junction R. R. *v.* Bank of Ashland, 12 Wall. 226; Kellogg *v.* Miller, 2 McCrary, 395; Sturdivant *v.* Memphis Nat. Bank, 60 Fed. 730; Andruss *v.* People's B. & L. Assoc., 94 Fed. 575; Dygert *v.* Vermont L. & T. Co., 94 Fed. 913.

IV. Place Intended by the Parties.

In some cases the court seeks to find the intention of the parties, and governs the contract by that.

Wayman *v.* Southard, 10 Wheat. 1 (*semble*); Gibson *v.* Conn. F. I. Co., 77 Fed. 561.

This is the rule most commonly laid down in the usury cases, where the parties are presumed to intend the law of the place of making or of the place of performance, according to which would make the contract valid.

Miller *v.* Tiffany, 1 Wall. 298; Cromwell *v.* Sac County, 96 U. S. 51; Fitch *v.* Remer, 1 Flip. 15; Matthews *v.* Murchison, 17 Fed. 760.

So in other than usury cases.

Hubbard *v.* Exchange Bank, 72 Fed. 234.

But where both laws would make the agreement usurious, the intention of the parties is allowed no weight, and the law of the place of making governs.

Andrews *v.* Pond, 13 Pet. 65; Heath *v.* Griswold, 18 Blatch. 555.

The doctrine that the intention of the parties governs, but that the parties are presumed to intend their contract to be governed by the law of the place of making, is accepted in a few cases.

Liverpool & G. W. S. Co. *v.* Phenix Ins. Co., 129 U. S. 397; Mutual L. I. Co. *v.* Cohen, 179 U. S. 262; Green *v.* Collins, 3 Cliff. 494; Potter *v.* The Majestic, 60 Fed. 624.

And in a few cases, on the other hand, the law of the place of performance is presumed to be that intended by the parties.

Pritchard *v.* Norton, 106 U. S. 124; Hall *v.* Cordell, 142 U. S. 116; Johnson *v.* Norton Co., 159 Fed. 361.

Where a bond is given to the United States, as required by law, it is presumed to be given in Washington and subject to the law of the District of Columbia.

Cox *v.* U. S., 6 Pet. 172; U. S. *v.* Stephenson, 1 McLean, 462.

When the parties expressly agree that a contract shall be subject to a certain law, in other words, when their intention is expressed, it has been

intimated, though never expressly decided by the Supreme Court, that the court will give effect to this intention.

Penn. M. L. I. Co. *v.* Mechanics S. B. & T. Co., 72 Fed. 413; Mutual L. I. Co. *v.* Phinney, 178 U. S. 327 (*semble*), affirming Mutual L. I. Co. *v.* Hill, 97 Fed. 263; Mutual L. I. Co. *v.* Hill, 193 U. S. 551 (*semble*), affirming s. c., 118 Fed. 708.

This may be a point not open to possible dispute, as where it amounts to fixing perfectly legal terms of agreement.

Mutual L. I. Co. *v.* Dingley, 100 Fed. 408.

But it is certain that no such stipulation will be given effect where it is regarded as against public policy,

Phillips *v.* Energia, 56 Fed. 124; Lewisohn *v.* National S. S. Co., 56 Fed. 602; Brotany W. Mills *v.* Knott, 76 Fed. 582;

or where the parties would thereby avoid the provisions of a statute of the place of making.

Equitable L. I. Co. *v.* Clements, 140 U. S. 222; Fowler *v.* Equitable Trust Co., 141 U. S. 384; Fletcher *v.* New York L. I. Co., 13 Fed. 526; Berry *v.* Indemnity Co., 46 Fed. 439; Mutual B. L. I. Co. *v.* Robison, 54 Fed. 580; Mutual L. I. Co. *v.* Hathaway, 106 Fed. 815; Albro *v.* Manhattan L. I. Co., 119 Fed. 629.